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No. 413

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

GENERAL ELECTRIC COMPANY, *Petitioner*,

v.

INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFL-CIO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

BENJAMIN C. SIGAL,
DAVID S. DAVIDSON,
1126 16th St., N. W.,
Washington, D. C. 20036.

BERTRAM DIAMOND,
482 Summer St.
Stamford, Connecticut 06902.
Attorneys for Respondent.

BAKER & DIAMOND,
482 Summer St.,
Stamford, Connecticut 06902.
Of Counsel.

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Opinions Below

The opinions of the Court of Appeals are reported at 332 F. 2d 485, and are printed with the Petition (51-68). The opinion and order of the District Court are reported at 221 F. Supp. 6, and are printed with the Petition (34-50).

Jurisdiction

The jurisdiction of this Court is invoked by Petitioner pursuant to 28 U.S.C. §1254 (1), 62 Stat. 928.

Questions Presented

1. Whether pursuant to a collective bargaining agreement providing for arbitration of grievances which involve "the interpretation or application of a provision" of the agreement, arbitration was properly compelled with respect to a grievance which claimed that Respondent had subcontracted bargaining unit work in violation of the provisions of the agreement, where evidence of bargaining history presented in opposition to arbitration did not relate to or establish any exclusion from the arbitration promise.

2. Whether Respondent's right to compel arbitration of this grievance was properly found unimpaired by a consent order of the National Labor Relations Board restraining a Local union of Respondent from inducing or encouraging employees to engage in a strike or concerted interruption of work to force Petitioner to assign work to employees represented by the Local rather than to other employees, where the order was entered pursuant to a stipulation which by its terms dispensed with findings of fact and conclusions of law regarding either a jurisdictional dispute or unfair labor practices, recognized that entry of the order constituted no admission that an unfair labor practice had been committed, and disclaimed any effect upon contract rights.

Statement of the Case

This case arose upon the refusal of Petitioner General Electric Company, hereinafter referred to as the Company, to arbitrate a grievance pursuant to the terms of a national collective bargaining agreement between the Company and Respondent for and on behalf of its Local unions at various locations of the Company, including its Local 203 representing employees at Bridgeport, Connecticut. Because Petitioner's Statement of the case contains both omissions and

misstatements we deem it necessary to restate the case so that the facts may be properly developed in their context.

A. *The Grievance and Arbitration Provisions*

The Agreement under which arbitration is sought was in effect from 1955 to 1960. Articles XIII and XV of the Agreement established grievance and arbitration procedures. The grievance procedure consisted of three steps. The first two steps were at the Local level, and failing resolution therein, the third step provided for submission of the grievance to the Company at the national level by the International Union (42a-43a).* If unresolved in that step, Article XV provided that either the International Union or the Company might submit the grievance to arbitration if it involved "the interpretation or application of a provision of this Agreement" (45a). However, the arbitration provision also provided that upon a request by either party for arbitration, if the other party notified the Arbitration Association that in its opinion the grievance did not raise an arbitrable issue, the Association would have authority to process the request only after final judgment of a court determining that the grievance "raises arbitrable issues" (46a).

B. *The Grievance and the Refusal to Arbitrate*

The grievance to be arbitrated arose in early 1958, when the Company decided to relocate the manufacturing and office facilities of its Automatic Blanket and Fan Department within the area of its plant at Bridgeport. This department, known as the Fan Department, was to be moved to premises then being vacated by the Home Heating and Cooling Department in the Bridgeport plant. The project

* Record references followed by the suffix "a" are to appellant's appendix below. Those follow by the suffix "b" are to appellee's appendix below.

involved transfer of existing machinery, installation of new machinery, and the remodeling and reconstruction of certain buildings. (3b-4b).

In the bargaining unit represented by Respondent and Local 203 at that time were employees classified as carpenters, painters, plumbers, electricians, sheet metal workers, riggers, millwrights, and the like. Many of such skilled trades employees in the unit had been laid off or transferred to lower paying positions for lack of work or were working short work weeks. (3b, 14b, 16b).

Upon learning that the Company was soliciting bids for the project from outside contractors, the Local union filed a general grievance dated March 10, 1958, at Step Two of the grievance procedure. The document was in the usual grievance form, captioned as a grievance. In its opening paragraph, which Petitioner ignores in its Petition, a clear protest, or grievance, is embodied. It reads (19a):

> "The Union has been informed the Fan Department will have to hire outside contractors to perform work which is normally done by our construction and maintenance employees."

Then follow a series of requests designed to protect the rights of the affected bargaining unit employees, calling for the Company to provide full employment to the aggrieved employees by utilizing their services on the Fan Department project for work claimed to be normally theirs.[1] Contrary to the Petition (p. 6), the work sought

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[1] The stipulation of facts by the parties in the District Court refutes any belated attempt to characterize this grievance as a mere "request for bargaining". (Petition, p. 6). It states (4b):

> "On March 10, 1958, Local 203, IUE filed at Step Two of the grievance procedure Grievance No. 129-58 protesting against defendant's plan to hire outside contractors to perform work at the Bridgeport

by the Local was not major remodelling and construction work beyond the normal duties and capacities of the bargaining unit employees (17b-19b).

While the grievance was still at the second step, on April 17, 1958, added substance was given to it when the Company contracted with Gellatly Construction Company, a general contractor, for the relocation of the Fan Department manufacturing facilities.[2] Work began immediately, and the Local union claimed that it caused further displacement of bargaining unit personnel (4b, 15b-18b).

Upon failure to resolve the grievance at the local level, the dispute was submitted by Respondent as a national level grievance (29a). At the national level or Step Three discussion on April 28, 1958, the specific claims of contract violation were denied by Petitioner. When Union representatives inquired as to the Company's willingness to arbitrate the grievance, the Company, through Ritter, its headquarters spokesman who was authorized to answer arbitration requests, replied that it was not arbitrable (35a, 15b, 19b, 26b).

On the evening of April 28, 1958, having been informed of the Step Three meeting, and particularly the Company's

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plant claimed by the Local to be work normally done by construction and maintenance trades employees within said bargaining unit."

The parties also stipulated that at the Step Three meeting, "as the Local Union had maintained at Step Two, the plaintiff [Union] claimed that the company was violating the National Agreement and the Local seniority supplement by assigning to an outside contractor work it claimed was normally performed by maintenance employees in the bargaining unit. Defendant [Company] denied any violation of contract" (5b).

[2] The Company distorts the time sequence in its assertion that it attempted to arrange for its employees to work along with members of the Building Trades Council *before* entering into the contract with Gellatly (Petition, p. 7). It entered into the contract in the midst of its discussions with the Local without notice to it and then asked the contractor to give consideration to the employment of the laid off employees, a request which would have been unnecessary if the Company had not subcontracted the work sought for the laid off employees (21a, 22a).

flat refusal to arbitrate the dispute, the maintenance trades employees in the bargaining unit voted to go on strike in protest of such refusal (20b). The strike began on the morning of April 29, 1958, the same day that the Company gave its final written answer to the grievance, confirming what it had told the Union in the meeting the previous day (5b). The strike had the sanction of the Local, but it was not called by Respondent International Union, and Respondent neither authorized it nor disavowed it; disavowal was never requested by Petitioner.

Throughout the strike the Local made it clear that the strike would be terminated if the Company changed its position with respect to arbitration.[3] (6b, 8b-9b, 20b-21b, 32a).

Respondent also, by telegram and letter, requested arbitration of the grievance and tendered for arbitration its detailed claims of violation of cited provisions of the National Agreement and the local supplement (30a-31a, 33a-34a). By letter of May 12, 1958, Petitioner, through Mr. Ritter, repeated in a letter to the American Arbitration Association its position that the grievance did not raise an arbitrable issue (35a).

C. *The NLRB Proceedings*

On April 30, 1958, Petitioner filed charges that Local 203 and its president Louis Santoianni, had violated Sections 8(b)(4)(A) and (D) of the National Labor Relations Act, 29 U.S.C. Sec. 158(b)(4)(A),(D).[4] The 8(b)(4)(D)

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[3] Under the Agreement, because of the Company's position, arbitration could not proceed in the absence of a final judgment of a court determining that the grievance "raises arbitrable issues" (46a). Art. XIV of the agreement bars strikes only unless and until the steps of the grievance procedure have been complied with or if the matter is submitted to arbitration (44a).

[4] The statement in the District Judge's opinion that the charges were filed against the Local and the International, as reprinted in the Appendix to the Petition (41) was later corrected to state that the charge was against the Local and its President (27b).

charge alleged that an object of the strike was to force an assignment of work to members of Local 203 (69a).

On May 7, 1958, the Regional Director filed a petition for a temporary injunction against Local 203 and its president pursuant to Section 10(l) of the National Labor Relations Act. 29 U.S.C. Sec. 160(l). This section authorized a Regional Director having "reasonable cause to believe such charge [under Section 8(b)(4)(D)] is true and that a complaint should issue" to petition a District Court for preliminary injunctive relief pending final adjudication by the Board (Pet. 31). In the District Court the Local and its president filed an answer denying the Regional Director's allegations of reasonable cause (6b).

The District Court entered no order. Instead, the Local and its president agreed with counsel for the NLRB General Counsel on May 15, 1958, that the aggrieved employees would cease picketing and striking. It was further agreed by the same parties that this undertaking in no way precluded pursuit of legal remedies with respect to arbitration of the dispute. Petitioner was not a party to said agreement (7b-8b).

The unfair labor practice charges filed by Petitioner against Local 203 and Santoianni, its president, were settled by stipulation dated November 13, 1958, between those respondents and the General Counsel for the NLRB (105a-111a). The stipulation was concluded before any jurisdictional dispute or unfair labor practice hearings were held under Sections 10(k) or 10(c), respectively, of the National Labor Relations Act. The settlement, to which Petitioner declined to become a party, followed the lines of the agreement reached in the 10(l) proceeding in the District Court. The respondents consented to entry of an order by the National Labor Relations Board prohibiting striking or picketing in furtherance of the work assignment dispute,

and to enforcement of such order by decree of a Court of Appeals. The stipulation further provided, among other things, that there would be no hearing or determination of the 10(k) dispute by the Board and no hearing, findings of fact, or conclusions of law by the Board relating to the alleged unfair labor practices (107a).

The only facts and conclusions of law set forth in the settlement stipulation were formal and jurisdictional; they described the business of the Company, identified Local 203 as the labor organization involved, and named its president as agent (106a-107a). Paragraph 5 of the stipulation states that the stipulation, the charges, the order consolidating the cases and the consolidated complaint "shall constitute the entire record herein" (107a). The 1955-60 National Agreement was not in the record.

Paragraph 8 of the settlement stipulation provides (110a):

> "8. This Stipulation contains the entire agreement between the parties, there being no agreement of any kind, verbal, or otherwise, which varies, alters or adds to it. The execution and signing of this Stipulation by the Respondents does not constitute an admission that the Respondents have violated any provision of the Act, nor does it constitute a waiver by the Respondents of their claims that the employees represented by Respondent labor organization were entitled to perform the disputed work described in the Notice of Charge Filed and Notice of Hearing pursuant to Section 10(k) and in the consolidated Complaint, and that the Company's assignment of such disputed work constituted a breach of the existing collective bargaining agreement heretofore made by and between the International Union * * * and the Company."

On February 24, 1959, the Board approved the stipulation, made the formal findings and conclusions provided for therein, and entered the agreed order. The Board's Decision and Order contained no findings of fact or conclusions of law concerning the work assignment dispute, any alleged unfair labor practices or any matters of contract (114a-119a). On April 21, 1959, the Court of Appeals for the Second Circuit entered a consent decree enforcing the order of the Board (120-121a).

D. *Collective Bargaining History*

Petitioner portrays the Union as repeatedly seeking, without success, during the period between 1954 and the present, a contractual limitation on the Company's right to subcontract work (Pet. 5). This picture distorts the facts.

Petitioner asserts that in 1954 the Union made such a contract demand (Pet. 5) and, as indicated on the insert preceding page 53a of its Appendix, that this 1954 proposal was made in negotiations for the 1955 National Agreement.[5] Neither of these statements is correct. Petitioner misinterprets a letter dated June 22, 1954 from officials of the Union to the president of the Company (53a-57a). In this letter the Union requested that the Company should take certain measures immediately to counter serious unemployment problems among GE workers. One such measure was to cease farming out work. Plainly this was not a demand that the ensuing collective bargaining agreement should incorporate a restriction on contracting out work. Attached to the letter was a list of major unresolved contractual issues as of June 23, 1954 (55a-57a). Farming out work was not among them. The request with respect to farming out

[5] This insert, like the caption placed above the letter at 53a is not part of the record but Petitioner's editorialized caption.

work in the letter of June 23, 1954, was for its total and immediate cessation, not for a contractual provision.

Moreover, the 1954 negotiations concluded on September 2, 1954, with execution of a settlement providing, among other things, for modification and extension of the National Agreement from that date until September 15, 1955 with annual renewal thereafter (Ex. 21, 8b).

The 1955 National Agreement is dated August 25, 1955, effective as of August 15, 1955. The record discloses no bargaining about subcontracting in the 1955 negotiations for a National Agreement.

The only contract proposals relating to subcontracting in evidence were advanced by the Union in negotiations during the 1958 contract reopener and the negotiations for the 1960 National Agreement, which was executed October 22, 1960, following expiration of the 1955 agreement on October 1, 1960. On both occasions the Union suggested additional contract language dealing with subcontracting. Significantly, such events occurred after the grievance in the present case arose, arbitration thereof had been demanded and refused, and an action to compel arbitration had been brought. The action was pending during the 1958 reopener negotiations and it remained pending through the 1960 negotiations.

The so-called wrap-up clauses in the 1955 and 1960 settlement agreements constitute nothing more than provisions ruling out further contract bargaining for the duration of the agreements (50a), and moreover did not apply to the 1954 agreement.

E. *The Decisions Below*

The District Court held that the arbitrability of the grievance under the terms of the arbitration agreement was settled beyond question in *Carey* v. *General Elec-*

tric Co., 213 F. Supp. 276, 292-3 (D.C.N.Y.), affirmed 315 F. 2d 499, (C.A. 2) cert. den. 377 U.S. 908 and *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (Pet. 37-39). Judge Blumenfeld rejected the Company's contention that the history of bargaining disclosed an intent to exclude subcontracting grievances from arbitration on the ground that this Court had rejected such history in *Warrior & Gulf*, even when it related to a clause which purported to remove such matters from the jurisdiction of an arbitrator, and because the history relied upon by the Company here does not even relate to any purported foreclosure of issues from arbitration (Pet. 40).

The District Court rejected the Company's contention that the cease and desist order entered by the NLRB against Local 203 with its consent constituted a disposition of the merits of the grievance adverse to Respondent on the ground that the merits of the grievance were not presented, litigated, or decided in the proceeding before the Board (Pet. 42-44).

With respect to the strike by the Local, the District Court held on the authority of this Court's decision in *Drake Bakeries* v. *Bakery Workers*, 370 U.S. 254, that the strike was neither a breach of a condition precedent to arbitration nor a waiver or repudiation of the right to arbitration, and that it was "even less permissible to regard the strike as a choice of remedy" (Pet. 45-49).

The Court of Appeals in its majority opinion by Judge Waterman, speaking for himself and Judge Marshall, agreed completely with the District Court. It rejected the Company's reliance on bargaining history, because it was "not designed to show that the parties, in drawing up their arbitration clause, intended to limit the promise to arbitrate certain classes of disputes; nor is it designed to

show that the parties, in agreeing to an exclusionary clause, meant to withhold from an arbitration certain types of questions" (Pet. 58, and 57-60).[6]

The Court of Appeals rejected the Company's reliance on the strike as foreclosing arbitration as "wholly without merit" since there was no election between two available judicial remedies[7] (Pet. 62-63). The Court of Appeals rejected the Petitioner's reliance on the NLRB decree because it was directed only toward the Local's strike activity, because it was designed specifically to permit the parties to pursue the resolution of their private contractual difference through another forum, and also because the issue of contract rights "was never fought out or decided" before the Board. (Pet. 63-64).

The dissent of Judge Lumbard was directed only to the interpretation of the arbitration agreement and the bargaining history by the majority. He expressed no disagreement with the majority's disposition of the contentions based on the strike and the NLRB proceedings. (Pet. 64-68).

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[6] It also rejected reliance on bargaining history which occurred during 1958 and 1960 negotiations on the ground that these negotiations occurred after the grievance was filed and after this action was commenced (Pet. 56, n. 2).

[7] The Court noted that Petitioner, in its appeal, had abandoned its contentions of breach of a condition precedent and waiver or repudiation based on the strike which it had made in the District Court.

ARGUMENT

Introduction

This Petition is a thinly disguised assault on this Court's *Steelworkers* decisions,[8] seeking by indirection to restore the rejected *Cutler-Hammer* doctrine[9] as an instrument of obstruction to thwart effectuation of arbitration agreements. The history of the litigation in this case is itself the best evidence of the need for and the wisdom of the *Steelworkers* decisions. For, six years after the grievance arose, and after four lower court decisions (Pet. 52), the Company still seeks to have this Court deny arbitration because, it asserts, the history of negotiations between the parties shows that there was no contractual limitation on its right to subcontract and the grievance is thus without merit.

We submit that Petitioner's efforts to clothe this assault on arbitration with new attire are, on their face, frivolous. The Petition presents no issue of importance to justify its request that this Court apportion its time to consider this case on its merits.

I. The Grievance Is Clearly Arbitrable Under the Terms of the Agreement

As the court below found, the grievance sought to be arbitrated called into question the interpretation and application of several provisions of the collective bargaining agreement, including the recognition, seniority, and

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[8] *United Steelworkers* v. *American Manufacturing Co.*, 363 U.S. 564; *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574; *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593.

[9] *International Assn. of Machinists* v. *Cutler-Hammer, Inc.*, 271 App. Div. 917, aff'd 297 N.Y. 519, rejected as federal law, in *Steelworkers* v. *American Mfg. Co.*, *supra*.

job description provisions (Pet. 53-54). Thus, as it involves "interpretation or application" of provisions of the agreement, it is arbitrable under the terms of the arbitration agreement, *Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574; *Westinghouse Electric Co.* v. *Local 1790, Int'l. Assoc. of Machinists*, 304 F. 2d 449 (C.A. 1); *Procter & Gamble Independent Union* v. *Procter & Gamble Mfg. Co.*, 298 F. 2d 644, 645 (C.A. 2), *International Tel. & Tel. Co.* v. *Local 400, International Union of Electrical Workers*, 286 F. 2d 329 (C.A. 3). Moreover, as the Court below observed, the questions of interpretation and application raised by this grievance are closely related to those in other work assignment disputes and for purposes of determining arbitrability, not distinguishable. *Carey* v. *General Electric Company*, 315 F. 2d 499, 505 (C.A. 2) cert. den. 377 U.S. 908; *Carey* v. *Westinghouse Electric Co.*, 375 U.S. 261.

Petitioner seeks to avoid the force of these decisions by resort to a history of bargaining which it contends shows that Respondent without success sought to obtain a contractual limitation on the Company's right to subcontract. It asserts that this history is forceful evidence of an intent to exclude subcontracting from arbitration. The decisions of the courts below so effectively and completely refute these contentions that it is both difficult and superfluous to add to them.

Petitioner claims that the court below erred in finding that the bargaining history did not establish an exclusion from arbitration, although it still cannot point to anything in the arbitration agreement which purports to give rise to such an exclusion. Even assuming, however, that another conclusion may be permissibly drawn from the facts, the question of interpretation of the arbitration agreement and the facts do not warrant review by this Court, for the

principles applied by the courts below were clearly correct. See Order dated April 1, 1963, *Carey* v. *Westinghouse Electric Corp.*, 372 U.S. 957, denying review of the second question posed in the petition for writ of certiorari therein.

Moreover, the argument set forth in the Petition does not demonstrate that the courts below were wrong.

Petitioner argues that when the arbitration promise is read in conjunction with the history of efforts to obtain a contract provision limiting the right to subcontract, "there is no 'provision' on which the arbitration clause might operate.' " (Pet. 15). But as the court properly found, this argument goes to the merits and not the arbitrability of the grievance. For Petitioner's argument ignores the recognition, seniority, and job description provisions of the agreement, the interpretation and application of which the Courts below found were involved in the grievance. These are "provisions" on which the arbitration clause does operate. How they are to be interpreted and applied is a question for the arbitrator. The bargaining history with respect to subcontracting may be pertinent to that determination, but only if the decision of this court in *Steelworkers* v. *American Mfg. Co., supra,* is reversed can that history have bearing on the obligation to arbitrate.

It simply does not follow from the facts, that the so-called "wrap-up" clause on which Petitioner relies indicated an intent to foreclose all grievances relating to subcontracting from arbitration, making a specific exclusion of such grievances from arbitration unnecessary. If the agreement was intended not to permit arbitration of the interpretation and application of the recognition, seniority and job description provisions of the agreement when relied on in connection with specific grievances over subcontracting, the mere failure to reach agreement on a clause restricting subcontracting in conjunction with the wrap-up

clause does not establish that intent so as to make a specific exclusion unnecessary.

Moreover, there are a variety of additional reasons why the vague, conclusionary and imprecise argument based on bargaining history was properly found without merit. As pointed out in the statement of facts above, the so-called bargaining history in the form of the 1954 letter is not bargaining history at all. The sole evidence offered was a letter containing requests unconnected with contract negotiations. The full text of the letter appears at 53a-55a.[10] The history attributed to 1958 and 1960 negotiations, as the court below held, could hardly give rise to an exclusion from arbitration of a grievance which was already the subject of a proceeding to compel arbitration when the negotiations occurred (Pet. 56, n. 2).

Thus, the attempt to evade the *Steelworkers* decisions and the earlier *Carey* v. *General Electric Co., supra*, by raising a question as to the weight to be given bargaining history in proceedings to compel arbitration is unsupported by the facts. For there is no history of any value to Petitioner on the record in this case, and there is no evidence, forceful or weak, of a purpose to exclude the grievance from arbitration and bring this case within the rule of construction set forth in *Warrior & Gulf*, which Petitioner both quotes and "recognizes" as applicable (Pet. 14). Indeed, as the court below noted, in the *Warrior & Gulf* case, a similar grievance was held arbitrable by this Court, notwithstanding a bargaining history showing efforts to negotiate a restriction of the employer's rights to subcontract, where the agreement provided an exclusion from arbitration for matters which were functions of management.

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[10] The caption appearing in the appendix above this letter is a self-serving characterization of the letter inserted by Petitioner in printing its appendix below and not part of the record.

Absent such an exclusion from arbitration, and indeed, absent a similar history, the result reached below was clearly compelled by *Warrior & Gulf*.

Only a brief paragraph need be added to dispose of the argument that the Local union's strike action "connotes the affirmative recognition by the Union of the non-availability to it of relief through the arbitration forum" (Pet. 15). This represents the final withered variant of a three branched argument to the District Court (Pet. 45), which died back to a single stalk in the Court of Appeals (Pet. 62, n. 7). Unable to demonstrate any error in the rejection of these arguments below, Petitioner now asserts that the strike somehow discloses an intent of the parties to exclude the grievance from arbitration. This conclusionary contention, presented here for the first time, is patently frivolous.[11]

II. There Is No Conflict of Circuit Court Decisions Which Warrants Grant of the Petition

Petitioner asserts that the decision below is in conflict with decisions of the Seventh and Ninth Circuits because the court below held it improper to consider bargaining history as part of the interpretative process to determine the intent of the parties unless it bears directly on the arbitration clause. The holding below that the history must bear on the scope of the promise to arbitrate is not in conflict with a decision of any other circuit. The court below noted that it could properly be questioned whether any bargaining history may be resorted to in a case such as this in the light of rules of construction of the *Steelworkers* cases that an exclusionary clause must be clear and unambiguous, taken in conjunction with the

[11] The factual distortions in connection with this afterthought argument are set straight by the statement of facts above at pp. 5-6.

usual rule that bargaining history is a proper interpretative tool only when a provision is ambiguous or unclear (Petition 58, n. 5). However, it found it unnecessary to reach this question, as the evidence of bargaining history in this case failed to establish the claimed exclusion from arbitration (Pet. 59, n. 6). The Court below thus expressly accepted the premise of the decisions of both the Ninth Circuit in *Pacific Northwest Bell Tel. Co.* v. *Communications Workers*, 310 F. 2d 244, and the Seventh Circuit in *Independent Petroleum Workers* v. *American Oil Co.*, 324 F. 2d 903, but found the bargaining history insufficient to avoid arbitration. It expressly avoided any conflict with either Circuit.

Petitioner appears to concede that the Ninth Circuit decision may be read compatibly with the decision of the court below (Pet. 19), and places its stress on the decision of the Seventh Circuit, now pending before this Court on writ of certiorari (No. 55, this Term).[12]

Petitioner asserts that the two decisions are in conflict because (1) the Seventh Circuit rejected the mere assertion of a breach of contract as sufficient to support arbitration and (2) it attached weight to a bargaining history similar to that at bar. (Pet. 17). But Petitioner ignores the differences in the two cases which makes the absence of conflict apparent.

In *Petroleum Workers*, the contract "limited" arbitrable questions to "Questions directly involving or arising from applications, interpretations or alleged violations of the terms of this agreement." In seeking to compel arbitra-

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[12] See also *Communications Workers* v. *Pacific Northwest Bell Telephone Company*, —— F. 2d ——, 57 LRRM 2203, 2207, n. 6, (C.A. 9, No. 19,246, September 28, 1964), affirming the decision of the District Court upon remand pursuant to its earlier decision, in which it is clear that the exclusion from arbitration is based upon bargaining history relating to the arbitration promise.

tion, the moving party in that case further confined its claim, predicating it only upon "alleged violations" of the terms of the agreement. Moreover, a second clause in *Petroleum Workers* further limited the arbitration promise by excluding from arbitration matters relating to conditions of employment not covered in the agreement as to which the right to bargain was however preserved.[13]

Thus, in that action any question of interpretation or application of the recognition or other provisions of the contract was specifically excluded as a contractual basis for compelling arbitration. In this case arbitration is specifically premised on such a question. The two decisions therefore of necessity pursue entirely divergent paths.

Moreover, in the path followed by the Seventh Circuit after deciding that mere allegation that the agreement has been violated was not enough to sustain arbitration under the different arbitration promise there invoked, the bargaining history became relevant to determine (1) whether there was a contract provision which could be alleged to be violated giving rise to the grievance "directly" within the meaning of the arbitration promise or (2) whether the grievance sought bargaining over a condition of employment not covered by the agreement which was excluded from the arbitration promise.

Thus, both decisions are premised on the assumption that bargaining history relevant to the arbitration promise may be considered. Assuming, without conceding, that the histories of bargaining relied on in both cases were similar, in the instant case the history relates to no exclusion from arbitration, and in the Seventh Circuit case it did.

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[13] The unique facts in that case disclose as well that the history of bargaining was intertwined with a prior unsuccessful attempt to compel arbitration of an identical grievance, giving rise to an alternative basis for denying arbitration on grounds of estoppel.

The different results flow from divergent facts and not from a conflict in decisions.[14]

The assertion that the decision below is in conflict with decisions of other circuits is without substance and affords no basis for a grant of the Petition.

III. The Decision Below Compelling Arbitration Is Not a Collateral Attack on Any Order of the National Labor Relations Board.

Petitioner contends that by compelling arbitration, the decision below is a collateral attack on the order of the National Labor Relations Board against the Local which went to the Local's strike activity. The facts surrounding entry of the order have been set forth in some detail above (pp. 6-9). Little argument need be added to these facts, and the decisions of both courts below, which speak for themselves (Pet. 41-44, 63-64), to make plain the barrenness of this contention.

Petitioner concedes that its contention cannot be sound unless the Board effectively passed "on the very question here sought to be submitted to arbitration" (Pet. 21). Its argument which follows exposes that its contention is unsound. It asserts that at the time of the entry of the order it was the Board's practice to determine whether a union charged with a violation of Section 8(b)(4)(D) had a valid contractual claim in determining jurisdictional disputes pursuant to Section 10(k). The Board's application for an injunction therefore, it claims, was a representation that the Union had no valid contractual claim, and the Board's order, "under these circumstances, amounted

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[14] While not reached in the instant case, questions raised by petition for certiorari in that case, we believe, warrant reversal of that decision. However, because they are not reached in this case and because there is not conflict between the decision of the court below and the Seventh Circuit, the petition in this case can be dismissed without being held pending argument and decision in the *Petroleum Workers* case.

to a finding that the Union was not entitled to the work in question under its contract with Petitioner". This unreasoned and unreasonable chain of assertions falls into odd juxtaposition with Petitioner's outraged protests in connection with the first question it poses that its contractual rights have been impaired merely by being required to arbitrate the merits of the claim.

Petitioner ignores that neither Respondent International nor Petitioner was a party to the Board proceeding; ignores the difference between a Section 10(k) determination to which the alleged "practice" refers and a Section 10(c) unfair labor practice proceeding; ignores the fact that there was no Section 10(k) hearing or determination, ignores the difference between the General Counsel of the Board who issues complaints and seeks injunctions under Section 10(l) when he feels he has reasonable cause to proceed and the Board which either decides cases on a record or issues orders based on stipulations; ignores that the contract was not part of the record before the Board; ignores the terms of the stipulation and the decision and order based thereon which contain no findings of violation of Section 8(b)(4)(D) but instead, contain an express non-admission clause; ignores the express reservation of contractual rights by the Local; and ignores that the order by its terms goes only to the strike and picketing, which constituted the alleged violation, and not to the dispute, which absent the strike and picketing did not violate the Act.

Petitioner's contention is equivalent to an assertion that a sentence of fines and imprisonment imposed in a criminal proceeding after entry of a plea of nolo contendere is in effect a finding that a criminal defendant committed a charged crime, admissible in a related civil proceeding, because it is a normal "practice" to levy such sentences only on guilty defendants. It can and should be readily dismissed.

Petitioner piously urges in support of this point that the decision below "would also threaten the integrity of the Board's settlement procedures". This is irresponsible nonsense. What impact on the Board's settlement procedures does Petitioner believe would result from a determination that a consent order makes a stipulated non-admission clause meaningless and a stipulated reservation of contractual rights worthless? Precisely because the Board represents the public interest which Petitioner here tries to twist to its private gain, the Board's order is immaterial to this proceeding.

The Petition herein illustrates that even with the relatively simple rules laid down in the *Steelworkers* decision, a resourceful party may seize upon inconsequential trifles to resist arbitration and frustrate national policy. Its prompt denial is imperative.

Conclusion

For the reasons set forth above, the petition for writ of certiorari herein should be denied.

Respectfully submitted,

BENJAMIN C. SIGAL,
DAVID S. DAVIDSON,
1126 16th St., N. W.,
Washington, D. C. 20036.

BERTRAM DIAMOND,
482 Summer St.
Stamford, Connecticut 06902.
Attorneys for Respondent.

BAKER & DIAMOND,
482 Summer St.,
Stamford, Connecticut 06902.
Of Counsel.